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WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of

Amendment of Rules Governing
Procedures to Be Followed When
Formal Complaints Are Filed Against
Common Carriers

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CC Docket No. 92-26

COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA

The Public Service Commission of the District of Columbia (D.C. PSC) hereby submits its comments on the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking regarding proposed changes to its rules governing the procedures applied to formal complaints against common carriers.¹ The D.C. PSC is of the view that parties should have the right to file briefs on factual issues after discovery is complete. Further, the D.C. PSC submits that the FCC should be cognizant of the D.C. PSC's concerns relating to certain of the FCC's proposed rule changes regarding complaints filed against common carriers. For example, with respect to the participation of the D.C. PSC in such proceedings, the District of Columbia Government is exempt from paying court costs or fees. Moreover, as the D.C. PSC is an administrative body created to perform similar functions as the FCC, only on an intrastate basis, we are aware of the limited time

¹ Notice of Proposed Rulemaking, In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, released March 12, 1992 (NPRM).

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frames in which proceedings must operate in order to avoid lengthy delays and protracted proceedings. However, based on the D.C. PSC's experience in litigating complaints before the FCC, some of the proposed rule changes do not afford parties an adequate time to respond and are not efficient methods of disposing of complaints. For instance, the amount of time the FCC proposes to afford parties to file motions to compel and/or production of documents is too restrictive. See infra Section IV. Also, as more fully explained infra Section I., parties should be granted an opportunity to brief factual issues before discovery is completed, even where the FCC has not ordered such briefing.

I. PARTIES SHOULD BE GRANTED AN OPPORTUNITY TO FILE BRIEFS ON FACTUAL ISSUES AFTER DISCOVERY IS COMPLETE

At Paragraph 9 of the NPRM, the FCC provides for a briefing schedule where the FCC or its staff orders such briefing.² The D.C. PSC contends that parties should be granted the opportunity to brief factual issues after discovery is completed, even when the FCC or its staff has not ordered such briefing. For example, in a recent proceeding, the FCC dismissed the D.C. PSC's complaint based on a finding that the D.C. PSC had not made an adequate factual showing, even though a discovery motion was pending and the D.C. PSC had never been given an opportunity to brief factual issues.³ Subsequently, the FCC granted the D.C. PSC's Petition for

² Id. at 4.

³ Public Service Commission of the District of Columbia v. The Chesapeake and Potomac Telephone Company, 5 FCC Rcd 5518 (1990).

Reconsideration and acted upon its pending motion to compel.⁴ However, the D.C. PSC was never granted an opportunity to brief factual issues.

In the D.C. PSC's view, it would be far more efficient for the parties to be given an opportunity to brief factual issues (except in cases where there is no factual dispute) after the factual evidence has been provided as a result of discovery. Such a rule would avoid claims that parties' due process rights have been denied when their complaints are dismissed based on factual issues.

II. DISTRICT GOVERNMENT IS EXEMPT FROM COURT COSTS AND FEES

In Paragraph 12 of the NPRM, the FCC proposes to assess parties the cost of filing formal complaints. The NPRM states that "[t]his new rule would expressly state that when a complaint is against multiple defendants, separate fees must be paid for each named defendant."⁵ However, with respect to the District of Columbia government, Section 15-705 of the D.C. Code expressly provides that "[t]he District of Columbia government or any officer thereof acting therefor may not be required to pay court costs or fees in any court in and for the District of Columbia government."⁶ This section applies to costs or fees paid by the government directly to a court or an adjudicating body, like the FCC. As a consequence, Section 15-705 would hamper or preclude the D.C. PSC

⁴ Public Service Commission of the District of Columbia, File No. E-89-146, Memorandum Opinion and Order, FCC 91-63, released March 8, 1991.

⁵ NPRM at 6.

⁶ D.C. Code § 15-705 (1981).

from paying a filing fee. Further, Congress passed the aforementioned legislation pursuant to its constitutional authority as legislature for the District of Columbia. A review of the legislative history reveals that Section 15-705 of the D.C. Code has remained substantially unchanged from its earliest predecessor, D.C. Code 1901, ch. 854 § 177, 31 Stat. 1219. There are no significant differences in the purpose of the statute as originally enacted in 1901 and its amendment in 1961. Both the Senate and the House Reports on the 1961 amendment of the 1901 statute state:

The District of Columbia government is required to conduct a large volume of business in the courts. Consequently, the requirement that the District pay court fees merely operates to translate money made available by Congress for certain purposes to moneys credited to the District of Columbia without adding to the District's revenues. The commissioners of the District of Columbia have advised the committee that the conduct of the District's business in the courts would be greatly facilitated by the enactment of the bill and would relieve the District of an unnecessary bookkeeping operation.⁷

In light of the aim of Section 15-705, the FCC should exempt governmental agencies, like the D.C. PSC, from the filing fee requirement.

III. THE PROPOSAL TO BIFURCATE DISCOVERY PROCEDURES INTO LIABILITY AND DAMAGE PHASES MAY NOT BE FEASIBLE IN ALL CASES

The FCC, at Paragraph 13, proposes that liability issues first be determined before discovery with respect to damages is

⁷ Dillard v. Yeldell, 334 A.2d 578 (D.C.C.A. 1975), citing S. Rep. No. 1511, 86 Cong., 2d Sess. 2 (1960), and H.R. Rep. No. 1204, 87th Cong., 1st Sess. 2 (1961).

permitted.⁸ The D.C. PSC is of the view that, in many cases, the line between liability and damages may not be easily drawn. If a complaint concerns whether rates are reasonable, evidence with respect to liability may be relevant to damages as well. Therefore, any discovery that is relevant to liability issues needs to be permitted even where it also relates to damages. Moreover, if discovery on liability is separated from damages, the FCC must determine the liability issues early enough to permit discovery with respect to damages.⁹

IV. TIME LIMITATIONS TO FILE MOTIONS TO COMPEL ARE TOO RESTRICTIVE

In Paragraph 14, the FCC proposes to change the discovery timetable regarding interrogatories.¹⁰ The proposed rule requires answers to interrogatories and request for documents within twenty (20), instead of the current thirty (30) days allowed.¹¹ Similarly, the proposed rule cuts the number of days available to file motions to compel answers and/or production from fifteen (15) to five (5) days.¹² The D.C. PSC, as an administrative body

⁸ NPRM at 6-7.

⁹ The D.C. PSC does not believe that discovery can be dispensed with unless ordered by the FCC staff. Even for complaints which are dismissed on legal issues, every complaint contains factual issues which are likely to require discovery. The ability of parties to immediately seek discovery facilitates the process. The D.C. PSC is of the view that requiring that discovery commences only after a staff order is issued, is likely to result in a delay of the proceeding.

¹⁰ NPRM at 7-8.

¹¹ Id. at 8.

¹² Id.

charged with similar responsibilities as the FCC on an intrastate basis, recognizes the need to shorten time periods in order to facilitate a timelier resolution of formal complaint proceedings. However, the proposal to cut the number of days to file motions to compel and/or production of documents from fifteen (15) to five (5) is too drastic and does not afford the parties an opportunity to adequately draft a pleading incorporating all of the necessary evidence needed to persuade the FCC to compel a response from the opposing party. Moreover, the shortened time period would not permit the D.C. PSC or other parties who have to consult with their principals (e.g., member associations of companies) to exercise their internal control procedures for review of the pleadings or documents within the five (5) day period.

V. MOTIONS SEEKING DISCOVERY BEYOND THE INITIAL THIRTY INTERROGATORIES SHOULD BE PERMITTED TO BE FILED AFTER ANSWERS TO THOSE INTERROGATORIES ARE FILED OR MOTIONS TO COMPEL ARE ACTED UPON

Proposed Rule § 1.730(c) limits motions seeking discovery to the period ending twenty (20) days after the date an answer must be filed, unless the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within the time period allowed.¹³ In the D.C. PSC's view, this proposal will not result in efficiency. In most cases, a complainant will not know whether additional discovery is necessary until it has reviewed the answers to initial discovery. Therefore, the burden should not be on the complainant to make a showing why

¹³ NPRM Appendix, Proposed Rule Changes, at 2.

its motion was delayed. The D.C. PSC, therefore, proposes that motions for additional discovery may be filed within fifteen (15) days of the receipt of answers to initial discovery or FCC action on any matter to compel, whichever is later.

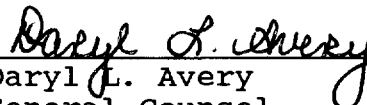
VI. CONCLUSION

The D.C. PSC acknowledges the FCC's attempt to facilitate timelier resolutions of formal complaints by eliminating certain procedures and pleading requirements that it perceives has caused unintended and unnecessary delays. Nevertheless, it is imperative that the FCC recognize the effect that the proposed rules will have on parties' effective participation in its proceedings.

Respectfully Submitted,

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